YAU SUN FATT

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
WAN HAMZAH SCJ
[CRIMINAL APPEAL NO. 62 OF 1985]
30 NOVEMBER 1987

CRIMINAL LAW AND PROCEDURE: *Cautioned statement - Evidence given before Judge in a trial within trial to determine admissibility - Judge ruled statement admissible - Jury trial on charge of murder - Whether same evidence could be repeated in presence of jury to determine weight and value of statement - Accused chose to remain silent after close of prosecution case - Whether accused should be allowed to repeat same evidence given in trial within trial before close of prosecution case or wait until defence is called.*

In this case, the appellant who was tried by a jury on two charges of murder was convicted and sentenced by the High Court. The issue that arose in this appeal was whether the evidence which was adduced before the Judge sitting alone in a trial within a trial in the absence of the jury to determine the admissibility of the cautioned statement and which was ruled admissible could be repeated in the presence of the jury to enable the jury to decide on the weight to be given to the cautioned statement. If so the issue was whether the accused could repeat the evidence before the close of the prosecution case or to wait until the defence case is called.

Held:

[1] The learned Judge who had ruled the cautioned statement to be admissible should have allowed the accused to call all the witnesses who had given the evidence in the trial within the trial before the learned Judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused need not have to wait until the defence was called, particularly when the accused chose to remain silent.

[2] As the accused chose to remain silent after the close of the prosecution case, the failure to allow him to repeat his allegations in the presence of the jury has deprived him of a fair trail.

[3] A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution case is the proper and indeed the fairest way of enabling the latter, as sole judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s. 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, the conviction so arrived could not stand.

[Appeal allowed. Conviction set aside. Sentence quashed and retrial ordered.]

Cases referred to:
Yaacob v. PP [1966] 1 MLJ 67
R. v. Francis and Murphy 43 Cr App R 174
R. v. Chadwick 24 Cr App R 138

R. v. Murray 34 Cr App R 203
Chan Wai-Keung v. Regina [1967] 1 All ER 948
Basto v. Regina [1954] 91 CLR 628

Legislation referred to:
Criminal Procedure Code, s. 214(iii)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Gooi Soon Seng, DPP

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial. As the issue is of great importance we consider that we ought to give a written judgment. Shortly, the issue relates to the manner the evidence given before a Judge sitting alone in a trial within a trial pertaining to the admissibility of a cautioned statement may be repeated in the presence of the jury to enable the jury to decide on the weight to be attached to the cautioned statement.

During the trial of two charges of murder against the accused the prosecution sought to put in a cautioned statement made by the accused while in police custody. On objection being taken by the defence to the admissibility of the cautioned statement, the learned Judge conducted a trial within a trial in the absence of the jury to determine the admissibility of the cautioned statement. After the learned Judge had ruled that it was admissible the jury then heard substantially the same evidence from the prosecution witnesses to decide on the weight to be given to the cautioned statement. On the authority of *Yaacob v. PP* [1966] 1 MLJ 67, the defence applied for the accused to give evidence on the cautioned statement. It was contended that the accused was entitled to do so at that stage and does not have to wait until the defence was called. The reason was that the accused might, as it happened here, wish to remain silent in which case he would have lost the opportunity to give evidence on the cautioned statement. On the other hand, the prosecution submitted that although the jury had the right at that stage to hear the prosecution witnesses who gave evidence at the trial within the trial they could not hear the accused. He took the view that the accused could do so when he gave his evidence in his defence.

In *Yaacob v. PP* after ruling that a confession was admissible the jury was recalled. The confession was then produced and admitted and read. The defence then asked to be allowed to call the accused to give evidence regarding the making of the confession but this application was refused. In his summing-up the Judge told the jury that he had admitted the confession because he was fully satisfied that it was made voluntarily. The jury were not told that they were entitled to their opinion of the way in which the confession had been obtained. In allowing the appeal the Federal Court held, *inter alia*, that although the question of admissibility of evidence is for the Judge and not the jury to decide, the question whether a statement is free and voluntary is a question of fact and must be decided on the evidence tendered by the prosecution and, if any, tendered by the accused.

In delivering the judgment of the Court, Thomson LP referred to the case of *R. v. Francis and Murphy* 43 Cr App R 174, where Parker LCJ stated:

> It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th [1959] Edn., of Archbold's *Criminal Pleadings*, etc., at paras. 1114 and 1115.

> 'The proper course,' it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the Judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear that a prisoner is entitled both to a ruling on admissibility from the Judge and also to hear the verdict of the jury on the weight and value of the confession.

Thomson LP went on to state:

> From the proposition that the accused person is entitled to have the verdict of the jury on the weight and value of the confession it clearly follows that if the confession is admitted the jury should hear the evidence which thitherto the Judge alone has heard. Then Counsel for the defence should be allowed to cross-examine the prosecution witnesses over again in the presence of the jury **and in due course, if so desired, to call the prisoner to repeat his evidence**. (Emphasis supplied)

The defence contended that the words underlined meant that if he so desired the accused would be allowed to repeat in the presence of the jury before the close of the prosecution case the evidence he gave earlier before the Judge alone. One reason why the accused should be allowed to repeat his evidence in connection with the cautioned statement after the Judge has ruled it to be admissible is because in the event that the accused decided to remain silent then the jury would have heard his evidence.

The learned Judge disagreed with the contention of the defence. It is not in dispute that a trial within a trial is a completely separate trial purely to determine admissibility as the question of admissibility is for the Judge alone. It would, of course, be convenient and time-saving to allow the jury to sit with the Judge to hear the evidence in a trial within a trial. However, this would be contrary to practice. (See *R. v. Chadwick* 24 Cr App R 138). Also, if the Judge ruled against admissibility the jury would have heard evidence which they should not have been allowed to hear.

In this case the learned Judge had ruled the cautioned statement to be admissible so that we see no reason why the same evidence could not be repeated in the presence of the jury, especially since the accused decided to remain silent when called to give his defence. It may be tedious, inconvenient and time-consuming but the accused cannot be denied his right to have his evidence repeated in the presence of the jury. We consider that the accused should be allowed to give his evidence on the cautioned statement at that stage. The learned Judge never gave him that option as the learned Judge took the view that the words "in due course" meant that the accused could elect to give evidence in his defence and could repeat his allegations. The learned Judge said in his ruling at p. 119 of the Appeal Record:

> ... Of course if he elects to remain silent he would have lost the opportunity to repeat the allegations but that does not mean that the jury in considering the weight to be attached to the statement, would not be directed to consider the allegations.

How could this be possible if the accused chose to remain silent when called for his defence as the jury would not have heard his allegations. If the weight and value of the cautioned statement were matters for the jury then it is only right that they should be allowed to hear the allegations of the accused. The accused must be given the opportunity to be heard by the jury before being called upon to enter into his defence. As Lord Goddard said in *R. v. Murray* 34 Cr App R 203, concerning the confession:

> Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained.

The truth of the confession is not directly relevant at the *voir dire*, but it will be a crucial question for the jury once the Judge admits it.

With the greatest respect, we are unable to agree with the learned Judge's interpretation of *Yaacob v. PP* as set out in his ruling. We consider that after the learned Judge had ruled on the admissibility and the cautioned statement was admitted the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned Judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused need not have to wait until the defence is called, particularly when the accused chose to remain silent.

We find support in our view from the decision of *Chan Wai-Keung v. Reginam* [1967] 1 All ER 948 & 953 where Lord Hodson referred to a statement by the High Court of Australia in the case of *Basto v. Reginam* [1954] 91 CLR 628:

> ... Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the Judge has heard or considered on a *voir dire* for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the Judge has formed or expressed in deciding that the statements were voluntary...

As the accused chose to remain silent after the close of the prosecution case, the failure to allow him to repeat his allegations in the presence of the jury has deprived him of a fair trial. A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution case is the proper and indeed the fairest way of enabling the latter, as sole Judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s. 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, we consider that a conviction so arrived could not stand. Therefore, we allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial.

Also found at [1988] 1 CLJ 160